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Neoh Ah Yan v Ong Leng Choo & Anor

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS S3–24–919 OF 2004
MOHD HISHAMUDIN J
13 SEPTEMBER 2007

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Civil Procedure — Administration of estates — Administrator — Application to appoint additional administrator and beneficiary — No allegations of mismanagement or misconduct by existing administrators — Whether such application more than a mere application to amend letters of administration — Whether such application a probate action under O 72 r 1(2) of the Rules of the High Court 1980 — Whether O 80 r 2(3)(e) of the RHC applicable

D

Civil Procedure — Mode of commencement — Whether correct originating process used — Action involving substantial and contentious disputes of facts — Action commenced by originating summons — Whether action ought to have commenced by way of writ — Whether suitable case to order proceedings continue as if begun by writ — Rules of the High Court 1980 O 28 r 8 & O 5 r 4

E

Civil Procedure — Writ of summons — When to commence by writ — Action involving substantial and contentious disputes of facts — Whether action ought to be commenced by writ — Rules of the High Court 1980 O 5 r 4

F

Succession — Probate — Contentious suit — Substantial disputes of facts — Action essentially for grant of letters of administration — Whether action a probate action under O 72 r 1(2) of the RHC — Whether action ought to commence by way of writ

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The deceased died intestate on 23 November 1992. Subsequently, letters of administration were issued to the defendants. The first defendant was the wife of the deceased. She married him in 1948 through a Chinese customary marriage. The marriage was later registered in 1976 under the Civil Marriage Ordinance, 1952. The second defendant was one of four children that the deceased had with the first defendant. The plaintiff however claimed that she was the lawful daughter of the deceased by reason of the deceased's marriage with her late mother. She claimed that the deceased had married her mother sometime in 1960, also through a Chinese customary marriage. The plaintiff thus applied, by way of originating summons, to be included as one of the

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administrators of the estate of the deceased, and also as one of his beneficiaries. The following procedural issues were presented to the High Court for determination: (a) whether the plaintiff's application was a 'probate action'; and (b) whether such application should have been commenced by way of writ pursuant to O 5 r 4 and O 72 r 2(1) of the Rules of the High Court 1980 ('the RHC'). The plaintiff contended that her application not a 'probate action' since the letters of administration had already been issued. Rather, her application was merely to amend the letters of administration to include herself as an additional administrator and as an additional beneficiary of the estate of the deceased.

Held, striking out the plaintiff's originating summons with costs with liberty to file afresh by way of writ:

(1) The plaintiff's application constituted a probate action within the meaning of the term 'probate action' under O 72 r 1(2) of the RHC. The suit was essentially an action for the grant of letters of administration to the plaintiff; and to be joined with the existing co-administrators of the deceased's estate. The plaintiff's application was more than a mere application to amend the letters of administration (see paras 17–18); *Datin Melati bt Abdullah & Ors v Syed Hassan bin Syed Salim (No 2)*[1999] MLJU LEXIS 880 distinguished.

(2) The present case did not involve allegations of mismanagement or misconduct by the administrators of the deceased's estate. In such a situation, the court could interfere under O 80 r 2(3)(e) of the RHC. The present case was essentially about the plaintiff's application to be joined as an administrator with the existing co-administrators, for the grant of letters of administration as provided under O 72 r 1(2) of the RHC. Therefore, O 80 r 2(3)(e) of the RHC was inapplicable. The plaintiff's application should have been commenced by way of a writ action, as provided for under O 72 r 2(1) of the RHC (see para 20).

(3) Even assuming that the present action was not a probate action, it still ought to have been commenced by way of writ action. There were substantial and contentious disputes of facts, which could only be determined by *viva voce*evidence, and not merely by way of affidavit evidence. Further, O 5 r 4 of the RHC would require that the proceedings be commenced by way of a writ action and not by originating summons (see paras 24, 28); *Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30; *Ng Wan Siew v Teoh Sin* [1963] 29 MLJ 103; and *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 followed.

(4) Since the instant case involved serious disputes as to the facts, it was inconvenient that the action proceed by way of originating summons. The High Court was thus not inclined to invoke its powers under O 28 r 8 of the RHC and order the proceedings to continue as if begun by writ (see para 34).

Obiter dicta:

(1) In the instant case, the court had to decide (on the merits) the following principal issues: (a) whether the plaintiff's late mother was ever married to the deceased through a Chinese customary marriage in early 1960; and (b) whether the plaintiff and her siblings were the lawful children of the deceased and plaintiff's late mother. The burden of proving these facts was upon the plaintiff (see paras 25–26); *Tan Ah Bee v Foo Koon Thye & Anor* [1947] MLJ 169 referred.

(2) In order for a party to satisfy the court of the existence of a Chinese secondary marriage such party must prove three things, namely: (a) cohabitation; (b) an intention to form a permanent union; and (c) recognition. As there are questions of facts involved, these questions of facts can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined (see paras 27–28); *Re Lee Choon Guan, deceased Lew Ah Lui (F) v Choa Eng Wan & Ors* [1935] MLJ 78 referred.

[Bahasa Malaysia summary

Si mati telah meninggal dunia tanpa meninggalkan wasiat pada 23 November 1992. Selanjutnya, surat mentadbir harta pusaka telah dikeluarkan kepada defendan-defendan. Defendan pertama adalah isteri si mati. Beliau telah berkahwin dalam tahun 1948 dengan perkahwinan adat resam Cina. Perkahwinan tersebut kemudiannya didaftarkan pada tahun 1976 di bawah Ordinans Perkahwinan Sivil, 1952. Defendan kedua adalah salah seorang daripada empat orang anak daripada perkahwinan si mati dengan defendan pertama. Plaintif, walaubagaimanapun menuntut bahawa beliau adalah anak perempuan sah kepada si mati disebabkan perkahwinan si mati dengan mendiang ibunya. Beliau menuntut bahawa si mati telah berkahwin dengan ibunya dalam sekitar tahun 1960-juga melalui perkahwinan adat resam Cina. Plaintif dengan itu memohon, melalui saman pemula, untuk memasukkannya sebagai salah seorang daripada pentadbir kepada estet si mati, dan juga sebagai salah seorang daripada waris-waris kadim. Isu-isu prosedural berikut telah dibentangkan kepada Mahkamah Tinggi untuk ditentukan: (a) sama ada permohonan plaintif adalah 'tindakan probet'; dan (b) sama ada permohonan seperti itu hendaklah dimulakan dengan writ menurut A 5 K 4 dan A 75 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif menegaskan bahawa permohonannya bukan 'tindakan

probet' memandangkan surat mentadbir harta pesaka telahpun dikeluarkan. Tambahan pula, permohonannya adalah sekadar untuk meminda surat mentadbir harta pesaka bagi memasukkan dirinya sebagai pentadbir tambahan dan tambahan sebagai waris-waris kadim untuk estet si mati.

Diputuskan, menolak saman pemula plaintif dengan kos dengan kebebasan memfailkan semula melalui tindakan writ:

(1) Permohonan plaintif mengandungi tindakan probet dalam maksud terma 'tindakan probet' di bawah A 72 K 1(2) KMT. Guaman pada asasnya satu tindakan untuk membenarkan surat mentadbir harta pusaka kepada plaintif dan dimasukkan berserta pentadbir-pentadbir sedia ada untuk estet si mati. Permohonan plaintif adalah lebih kepada satu permohonan meminda surat mentadbir harta pusaka (lihat perenggan 17–18); *Datin Melati bt Abdullah & Ors v Syed Hassan bin Syed Salim (No 2)* [1999] MLJU LEXIS 880 dibeza.

(2) Kes sekarang tidak melibatkan dakwaan salah pengurusan atau salah laku oleh pentadbir-pentadbir estet si mati. Dalam situasi sedemikian, mahkamah boleh mencampuri di bawah A 80 k 2(3) KMT. Kes sekarang pada dasarnya mengenai permohonan plaintif untuk dimasukkan sebagai pentadbir dengan pentadbir-pentadbir sedia ada untuk membenarkan surat mentadbir harta pusaka sebagaimana disediakan di bawah A 72 k 1(2) KMT. Oleh itu, A 80 k 2(3) KMT tidak terpakai. Permohonan plaintif hendaklah dimulakan melalui tindakan writ, sebagaimana disediakan di bawah A 72 k 2(1) KMT (lihat perengaan 20).

(3) Walaupun dengan andaian bahawa kes sekarang adalah bukan tindakan probet, ia masih perlu dimulakan dengan tindakan writ. Terdapat pertikaian fakta yang amat banyak dan boleh dipertikaikan, yang hanya boleh diputuskan dengan keterangan *viva voce*, dan bukan hanya melalui keterangan affidavit. Selanjutnya, A 5 k 4 KMT memerlukan bahawa prosiding dimulakan dengan tindakan writ dan bukan melalui saman pemula (lihat perenggan 24, 28); *Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30; *Ng Wan Siew v Teoh Sin* [1963] 29 MLJ 103; dan *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 diikut.

(4) Memandangkan kes ketika ini melibatkan pertikaian-pertikaian yang serius kepada fakta-faktanya, ia adalah tidak sesuai bahawa tindakan ini diteruskan dengan saman pemula. Mahkamah Tinggi, oleh itu tidak condong untuk menggunakan kuasanya di bawah A 28 k 8 KMT dan memerintahkan prosiding-prosiding diteruskan seolah-olah ia dimulakan dengan writ (lihat perenggan 34).

Obiter dicta:

(1) Dalam kes ketika ini, mahkamah telah memutuskan (berdasarkan kepada merit-merit) isu-isu utama berikut: (a) sama ada mendiang ibu plaintif telahpun berkahwin dengan si mati melalui satu adat resam perkahwinan Cina pada awal tahun 1960, dan (b) sama ada plaintif dan adik-beradiknya adalah anak-anak yang sah kepada si mati dan mendiang ibu plaintif. Beban pembuktian fakta-fakta ini adalah terletak kepada plaintif (lihat perenggan 25–26); *Tan Ah Bee v Foo Koon Thye & Anor* [1947] MLJ 169 dirujuk.

(2) Bagi tujuan pihak memuaskan hati mahkamah berkenaan kewujudan perkahwinan Cina yang kedua pihak terbabit hendaklah membuktikan tiga perkara, iaitu; (a) bersekedudukan; (b) niat untuk membentuk ikatan yang kekal; dan (c) pengiktirafan. Memandangkan terdapat persoalan-persoalan fakta yang terlibat, persoalan-persoalan fakta ini hanya boleh diselesaikan secara teratur dan memuaskan jika keterangan lisan dikemukakan dan saksi-saksi disoal balas (lihat perenggan 27–28); *Re Lee Choon Guan, deceased Lew Ah Lui (F) v Choa Eng Wan & Ors* [1935] MLJ 78 dirujuk.]

Notes

For cases on administrator generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 214–228.

For cases on contentious suit, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2533–2540.

For cases on when to commence by writ, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 8152–8154.

For a case on whether the correct originating process was used, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4824.

Cases referred to

Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors [1998] 4 MLJ 268 (refd)

Datin Melati bt Abdullah & Ors v Syed Hassan bin Syed Salim (No. 2) [1999] MLJU LEXIS 880 (refd)

Jigarlal Kantilal Doshi & Anor v Damayanti Kantilal Doshi (Executrix) & Anor [1998] 1 SLR 211 (refd)

Ligar Fernandez v Eric Claude Cooke [2002] 5 MLJ 177 (refd)

Ng Wan Siew v Teoh Sin [1963] MLJ 103 (refd)

Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30 (refd)

Lee Choon Guan, Re, deceased Lew Ah Lui (F) v Choa Eng Wan & Ors [1935] MLJ 78 (refd)

Tan Ah Bee v Foo Koon Thye & Anor [1947] MLJ 169 (refd)

Tan Khay Seng v Tan Kay Choon & Anor [1990] 1 MLJ 51 (refd)

Ting Ling Kiew & Anor v Tan Eng Iron Works Co Ltd [1992] 2 MLJ 217 (refd)

Legislation referred to

Civil Marriage Ordinance 1952 ss 14(1)(d), 30(b)
Rules of the High Court 1980 O 5 r 4, O 28 r 8, O 72 r 1(2), O 80 r 2(3)(e)

Quah Soon Wai (Seow & Megat) for the plaintiff.
Mohamed Zaid (LC Chong & Co) for the defendants.

Mohd Hishamudin J:

[1] This originating summons is an application by the plaintiff to be included as one of the administrators of the estate of one Neoh Eng Hong ('the deceased') and also as one of the beneficiaries of the said estate.

[2] I have striked out the originating summons with costs but with liberty given to the plaintiff to proceed afresh by way of a writ action.

[3] I shall now give my grounds.

[4] I shall begin by alluding briefly to the background facts of the case. The first defendant, Ong Leng Choo is the wife of the deceased (Neoh Eng Hong). She married the deceased on 11 November, 1948 in accordance with Chinese customary marriage. The marriage was later registered on 24 March 1976 under the Civil Marriage Ordinance, 1952. She and the deceased had four children, namely, Neoh Hoe Suan, Neoh Hoe Shin (the second defendant), Neoh King Hun and Neoh Sun Meng.

[5] In the present case, it is alleged by the plaintiff that, during the subsistence of the marriage of the first defendant with the deceased, the latter had married her late mother, Wong Ah Kim. The alleged marriage took place in the early part of the year 1960 under Chinese customary marriage. By this marriage, the deceased and the plaintiff's late mother had four children, namely, Neoh Ah Yan (the plaintiff), Neoh Siew Hwa, Neoh Ah Geat and Neoh Siew Lung. The plaintiff's mother had two other children by a previous marriage, namely, Tan Pooi Fong and Tan Pooi Fun. The plaintiff's mother died on 23 June 1997. According to the plaintiff, her late mother and the deceased had been staying together since she was born. They stayed at a premise having an address at No. 57A, Jalan Kampar, Off Jalan Pekeliling, until the death of the deceased on 23 November 1992.

[6] The deceased died intestate on 23 November 1992. On 17 August 1999, the defendants filed a petition at the High Court of Kuala Lumpur for

A the letters of administration in respect of the estate of the deceased. The letters of administration were issued to them.

B [7] The plaintiff claims that she is the lawful daughter of the deceased by reason of the deceased's marriage with the plaintiff's late mother. She, therefore, claims that she is entitled as a beneficiary to the estate of the deceased. Hence, she applies to be included as an administrator and as a beneficiary of the deceased estate.

C [8] The plaintiff alleges that the registration of the deceased's marriage with the first defendant is not valid by reason of s 30(b) Civil Marriage Ordinance 1952 because at the time of the registration, the deceased was (allegedly) still married to her mother under Chinese customary marriage. Section 30(b) Civil Marriage Ordinance provides:

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> 30. Any marriage purported to be solemnized under this Ordinance shall be void if:
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> (a) ...
>
> E (b) either of the parties was at the date of such marriage married under any law, religion, custom or usage to any person other than the other party;

F [9] The defendants, on the other hand, contends that from the fact that the deceased registered the marriage with the first defendant under the 1952 Ordinance in 1976, an inference could be made that there was no other marriage (civil or custom) subsisting then between the deceased and any other person since s 14(1)(d) of the Ordinance required the deceased, at the time of applying for the registration of his marriage to the first defendant to declare that he, at that point of time was never married to anyone else (other than the first defendant) under any law, religion or custom. Section 14(1)(d) reads:

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> Every notice required to be given under the provisions of s 11 of this Ordinance shall be accompanied by a written declaration:
>
> (a) ...
>
> (b) ...
>
> I (c) ...
>
> (d) that neither of the parties to the intended marriage is married under any law, custom, religion or usage to any person other than the person with whom such marriage is proposed to be contracted.

[10] Procedurewise, I find that the present application raises the following issues:

(a) whether this action is a 'probate action' as defined under O 72 r 1(2) of the Rules of the High Court 1980 ('the RHC');

(b) if the answer in (a) above is in the affirmative, then, whether this action should have been proceeded by way of a writ action instead of by way of an originating summons by reason of O 72 r 2(1) of the RHC; and

(c) whether, in any case, this action should have been proceeded by way of writ action (instead of an originating summons) since there are disputes as to the facts, as required by O 5 r 4 of the RHC.

[11] In regard to the issue (a) above, it is the plaintiff's contention that this action is not a 'probate action' as defined under O 72 r 1(2) of the RHC as the letters of administration have already been issued on 8 April 2000. The plaintiff submits that the present application is merely to amend the letters of administration to include herself as an additional administrator and as an additional beneficiary of the estate of the deceased. Therefore, the plaintiff contends, O 80 r 2 of the RHC applies as this provision allows amendment to be made to the letters of administration, and O 80 does not specifically require that the proceeding be instituted by way of a writ action.

[12] Order 72 r 2(1) of the RHC provides as follows:

> 2(1) A probate action must be begun by writ, and the writ must be issued out of the Registry.

[13] Order 80 r 2 of the RHC provides as follows:

> 2(1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

[14] Order 5 r 4 of the RHC provides as follows:

> 4(1) Except in the case of proceedings which by these rules or by under any written law are required to be begun by writ or originating summons or are required or authorized to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.
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> (2) Proceedings:
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> (a) in which the sole or principal question at issue is or is likely to be, one

A of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or some other question of law; or

(b) in which there is unlikely to be any substantial dispute of fact,

B are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under O 14 or 0 81 or for any other reason considers the proceedings more appropriate to be begun by writ.

C **[15]** The plaintiff relies on the case of *Datin Melati bt Abdullah & Ors v Syed Hassan bin Syed Salim (No 2)* [1999] MLJU LEXIS 880. The plaintiff contends that pursuant to O 80 r 2 of the RHC, an action may be brought for the determination of any question or the granting of any relief, which could be determined or granted in an administration action. In *Datin Melati* D the proceeding was commenced by way of an originating summons. At the outset I must rule that O 80 r 2 of the RHC is inapplicable to the present case, and the case cited does not support the position taken by the plaintiff.

E **[16]** Order 72 r 1(2) of the RHC reads:

1(2) In these rules 'probate action' means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious.

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[17] In my judgment, the present action is a probate action within the meaning of the term 'probation action' as defined under O 72 r 1(2) of the RHC. This suit is essentially an action for the grant of letters of G administration to a person, that is, the plaintiff; to be joined with the existing co-administrators to administer the estate of the late Neoh Eng Hong. In other words, it is (to quote r 1(2)) 'an action for the grant of … letters of administration of the estate, of a deceased person'. To my mind, it cannot be said that the present action is merely an application to amend the letters of H administration. It is more than that.

[18] The case of *Datin Melati* referred to by the plaintiff can be distinguished as that case relates to an application by the plaintiffs to remove the defendant as one of the administrators of the estate of a deceased on the I ground that he had failed to carry out his duties as an administrator of the estate. Further, in this case cited, the applicability of O 72 r 2(1) was not an issue before the Court. It is also not in issue as to whether the action, which was an originating summons, should have been commenced by way of a writ action.

[19] The other cases cited by the plaintiff, namely:

(1) *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177;

(2) *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268; and

(3) *Tan Khay Seng v Tan Kay Choon & Anor* [1990] 1 MLJ 51,

are also irrelevant for the same reason.

[20] To my mind, the present case is not one that involves an allegation of mismanagement or misconduct on the part of the administrators of the estate of the deceased, where the court can interfere by virtue of O 80 r 2(3)(e) of the RHC. The present case is essentially the plaintiff's application to be joined as an administrator with the existing co-administrators for the grant of letters of administration as provided under O 72 r 1(2) of the RHC. Therefore, O 80 r 2(3)(e) of the RHC is inapplicable.

[21] Since issue (a) above is answered in the affirmative, therefore, the present application should have been commenced by way of a writ action, as clearly provided for under O 72 r 2(1) of the RHC. This provisions stipulates:

> 2(1) A probate action must be begun by writ, and the writ must be issued out of the Registry.

[22] The word 'must' denotes that it is mandatory for the action to begin by way of a writ action. In the Malaysian High Court Practice, at p 2472, at para 72.1.4, it is stated:

> *[72.1.4] Actions for the revocation of grant*
>
> An application to revoke grant of probate is by probate action as defined in the Probate and Administration Act 1959 (Act 97) s 2 and RHC O 72 r 1(2), and is to be begun by writ: *Jirgarlal Kantilal Doshi & Anor v Damayanti Kantilal Doshi (Executrix) & Anor* [1998] 1 SLR 211 (a probate action begun by originating motion may be struck out on application by the defendants).

[23] In *Jirgarlal Kantilal Doshi & Anor v Damayanti Kantilal Doshi (Executrix) & Anor* [1998] 1 SLR 211, Choo Han Teck JC said:

> Mr. Manjit Singh had also submitted that the plaintiffs initiated the wrong originating process. He argued that this originating motion was the wrong process and on this ground alone the application ought to be dismissed.
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> Section 2 of the Probate and Administration Act (Cap 251) defines 'Probate action' as 'a cause or matter in which a petition for probate or letters of administration is contested by any person, and includes any application to alter or revoke the grant

of any probate or letters of administration'. This clearly included the present action to revoke the grant of probate to the defendants. The definition of a probate action is repeated in O 72 r 1(2) of the Rules of High Court 1980.

By O 72 r 2(1) the Rules stipulate that a 'probate action must be begun by writ, and the writ must be issued out of the Registry'. Rule 2(2) requires that the writ must be endorsed with a statement of the nature of the interest of the plaintiff and the defendant in the estate before the writ is issued. Rule 2(3) further stipulates that a writ shall not issue unless a citation under r 7 has been issued or the probate has been lodged with the registry. In this case there was no issue of a citation and the probate was not lodged with the registry (since it was not yet extracted).

These rules as set out in the Rules of Court clearly required an action of the sort that the plaintiffs had taken out to be begun by writ in accordance with O 72. Furthermore, under O 5 r 5, a party may proceed by way of an originating motion 'if, but only if, by these Rules or by any written law the proceedings in question are required or authorized to be so begun'. I agree with Mr Manjit Singh that the wrong procedure was adopted. It is fairly serious error and one which would have justified the defendants striking it out if such an application had been made in the first instance. However, as counsel for the defendants elected to oppose the motion on merits no application was made to strike out the motion. Since no prejudice was occasioned to either party, I decided to hear the application on its merits.

[24] In relation to the third issue (c), in my judgment, even assuming for the moment that the present action is not a probate action, it still ought to have been commenced by way of a writ action. In contending that there are no disputes as to the facts, the plaintiff refers to the second defendant's letter at exh. NAY-6 of encl. 2, where the second defendant has admitted that the plaintiff has an interest in the estate of the deceased. The plaintiff contends that this evidence is sufficient to show that it is not necessary to call witnesses and expert evidence to verify any document. It is further submitted by the plaintiff that if this court is of the view that this action should have been by way of a writ action, since it involves dispute as to facts, in the interest of justice, the court may order the proceedings to continue as if the cause or matter had begun by writ, as provided under O 28 r 8 of the RHC.

[25] In my judgment, in the light of the foregoing, the matter before me is too contentious and it is inappropriate to be determined merely by way of affidavit evidence. There are substantial disputes as to the facts and it is incumbent to hear a *viva voce* evidence. The court has to decide inter alia, on the following principal issues:

(a) whether the plaintiff's late mother was ever married to the deceased under Chinese customary marriage in early 1960; and

(b) whether the plaintiff and her siblings are the lawful children of the deceased and plaintiff's late mother.

[26] It hardly needs adding here that the burden of proving facts (a) and (b) above is on the plaintiff. In *Tan Ah Bee v Foo Koon Thye & Anor* [1947] MLJ 169 Carey J said:

> It is established that a Chinese man may have as many wives as he may disposed to. Usually, he has a principal wife and may have several wives as well. No precise ceremony of marriage is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the status of a wife in order that a secondary marriage may be established.

[27] In *Re Lee Choon Guan, Deceased Lew Ah Lui (F) v Choa Eng Wan & Ors* [1935] MLJ 78 Terrell J held that in order for a party to satisfy the court of the existence of a Chinese secondary marriage he must prove three things, namely:

(a) cohabitation;

(b) an intention to form a permanent union; and

(c) recognition.

[28] As there are questions of facts involved, these issues of facts can only be properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined. I hold that, in any event, even assuming that O 72 r 2(1) of the RHC does not apply, still O 5 r 4 of the RHC requires that this proceeding be commenced by way of a writ action and not by originating summons (see *Persuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30; *Ng Wan Siew v Teoh Sin* [1963] 29 MLJ 103; and *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217).

[29] In *Persuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 where Raja Azlan Shah J (as he then was) held that:

> When a question of fact is at issue action is to be by way of writ and not by originating summons because disputed question of fact and law are involved. This is because the facts have to be established by examination and cross-examination of witnesses.

[30] In *Ng Wan Siew v Teoh Sin* [1963] MLJ 103 Thomson CJ (as he then was) in delivering the decision of the Court of Appeal said:

> It is to effect that these proceedings should have been started by writ and not by originating summons. Theoretically, they could have been started either by writ or originating summons but it has been said again and again that when it is known that there is going to be conflict of testimony and a necessity for taking parol evidence the proceedings should have been commenced by writ and a plaintiff if

A successful may be deprived of any additional costs caused by his having commenced proceedings by way of originating summons.

[31] In *Ting Ling Kiew & Anor v Tan Eng Iron Works Co Ltd* [1992] 2 MLJ 217, it was held by Supreme Court that:

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> Unquestionably, these conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidenced which, however, was not possible in proceedings begun by originating summons.

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[32] Order 28 r 8 of the RHC, as referred to by the learned counsel by the plaintiff, gives the court the discretionary power to order the present proceedings to continue as if the cause or matter had begun by writ.

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[33] Rule 8 states:

> 8.(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause of matter had been begun by writ, it
E may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

F

[34] Since the present case involves serious disputes as to the facts, I think that it is inconvenient that this action should proceed by way of an originating summons. I am not inclined to invoke my powers under O 28 r 8 of the RHC, as suggested by the learned counsel. For it is clear, from the very beginning the plaintiff ought to have known that there are likely to be
G serious disputes as to the material facts. In other words, right from the very beginning the plaintiff must have known that originating summons is not the appropriate mode.

H **[35]** Hence, the originating summons is struck off with costs with liberty to the plaintiff to proceed afresh by way of a writ action.

Originating summons struck off with costs.

I Reported by Andrew Christopher Simon